

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: October 27, 1997
Case No: 96-INA-159

In the Matter of:

NAPCO SECURITY SYSTEMS, INC.
Employer

On Behalf of:

MOHAMMAD MANAF AKBARI
Alien

Appearance: Reaz H. Jafri, Esq.
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Mohammad Manaf Akbari ("Alien") filed by Napco Security Systems, Inc.. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under

prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On March 30, 1994, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Production/Planner/Engineer in its Manufacturer and developer of Electronic Security/Safety Systems company.

The duties of the job offered were described as follows:

Plan, prepare and coordinate production schedules employing Material Requirements Planning (MRP). Customize Item Master & Item Balance records & Product Structures. Evaluate & modify Subassemblies, Phantom Assemblies, Lead Time Adjustments, Order Policy Codes, Floor Stock Codes, Shrinkage Factors, Features/Options & Planning Horizon. Forecasting, Production Planning, Master Scheduling, Production & Inventory Control using MAPICS & MRP.

An M.S. in Industrial/Mechanical (Engineering) was required, and 2 years experience in the job offered or 5 years in related occupation. Special Requirement was MRP, proficiency in Engineering computer software & systems. Wages were \$35,000.00 per year. The applicant would supervise 2 employees and report to the Director of Manufacturing. (AF-1-134;262) 4 applicants were referred by the State employment service.(AF-135)

On August 11, 1995, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(6) in that U.S. applicants were rejected for unlawful reasons, specifically Mr. Francis B. Mone, Mr. Charles Loeber and Mr. Sarfaraz A. Siddiqui. The CO required documentation by employer that these applicants were not qualified, willing or available at the initial referral and consideration. Additionally, the CO stated that Employer may have violated 20 CFR 656.21(b)(2) in that the requirement for an M.S. was not adequately documented as arising from business necessity. "In addition employer in consideration of U.S. workers added a requirement for passing some kind of test, unmentioned prior to the emergence of applicants for the job." (AF-137-143)

Employer, September 15, 1995, forwarded its rebuttal, which included a history of the company's attempts to obtain needed personnel for its highly competitive business, detailing how the current job opportunity arose, a letter from Professor Konz of Kansas State University in support of the requirement for a

Master's degree in Engineering in connection with the job opportunity, and reasons for the rejection of the three U.S. applicants. With respect to the job opportunity and requirements, employer stated: "Given the highly dynamic nature of our business, the intricacy and complexity of the tasks to be performed and the business necessity of having one individual performing these duties in an integrated and efficient manner, the position of Production Planner/Engineer was created. Given our experience with the previous two individuals who attempted, and failed, to manage our system of operation within an MRP framework and after much consideration we determined that an ideal candidate should possess a minimum of a Master's Degree in Industrial or Mechanical Engineering and also have at least five years experience in Manufacturing Engineering. In addition to being common in the industry, our reason for establishing these minimum requirements were directly related to our business necessity. As stated above, NAPCO's competitiveness and survival depends on the efficient integration of the various components of the planning, manufacturing and engineering processes within a sales driven market." With respect to Mr. Mone, Employer stated he did not show up for a scheduled interview, and, moreover, wasn't qualified. Specifically, no documentation in forecasting was made. Mr. Siddiqui did not return phone calls. "Without an opportunity to interview Mr. Siddiqui, we made a general evaluation of his resume and stated that it was "questionable" whether he was qualified. "Questionable" was not meant to imply doubtful but rather that it could not be fully determined without an interview." (AF-144-185)

On September 20, 1995, the CO issued a Final Determination, denying certification. While not disagreeing with Professor Konz's conclusion that a M.S. may be useful it is not essential given the overall requirements of the job opportunity. With respect to applicant Mr. Mone, the CO stated: "...employer has not shown why Mr. Mone's considerable experience and a degree seeming to qualify as a baccalaureate in Engineering with Production Method emphasis, do not qualify him to perform job duties. While employer also states Mr. Mone lacks forecasting experience he managed five separate departments and absent serious, thorough review of total and impressive qualifications, it seems premature to zero in on one element in a job with, other core duties attached to it. Moreover, employer has elected to substitute 5 years manufacturing engineering as experience acceptable to 2 years in job offer. His qualifiers for this experience do not include forecasting background." The CO found that the requirement of filling out a questionnaire was a euphemism for a test, which was unwarranted before an interview and was meant to discourage applicant from perusing his application. With respect to applicant Siddiqui, employer failed to document such contacts as was required in his NOF. The CO concluded that employer had failed to demonstrate good faith recruitment efforts. (AF-186-191)

On October 26, 1995, Employer filed a request for review and

reconsideration of Final Determination. (AF-192-292)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent., Inc. 87-INA-607 (1988). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32. (April 5, 1989) Thus where a CO fails to address contentions raised by Employer on rebuttal, the CO may be reversed. Duarte Gallery, Inc., 88-INA-92 (October 11, 1989).

We believe the CO was correct in denying certification on the narrow basis that employer had not directly rebutted the CO's requirement that documentation of contact by employer with applicant Siddiqui, who seemed eminently qualified for the position including having a Master's degree, had not been documented. Employer has the burden to make multiple phone calls certified mail or other efforts to contact applicants, and must clearly document those efforts. Batal Builders, Inc., 95-INA-330 (October 1, 1997); Domenico Marino, 94-INA-245(July 19, 1995).

Moreover, we find the evidence in this case supports the CO's position that an M.S. in Industrial or Mechanical Engineering was not justified as a business necessity that could not be replaced by equivalent experience. We note that alien was hired by Employer in 1990, at which time alien had an M.S. in engineering, with very little practical job experience. Employer has recited a long history of the company's evolution since that time in the pertinent business expansion, and has implied that alien has become a valued employee who has even garnered more expertise and succeeded where others in the company of similar background have failed. Thus Employer has demonstrated why it desires alien as an employee. It has not demonstrated, however, that it has engaged in a good faith recruitment of U.S. applicants as required for labor certification.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge